

OPEN FOR COMMENT UNTIL SEPTEMBER 20, 2019

Standard III. Confidentiality: A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

- A. A mediator shall not disclose, directly or indirectly, to any non-participant, any information communicated to the mediator by a participant within the mediation process, whether the information is obtained before, during, or after the mediated settlement conference. A mediator's filing with the appropriate court a copy of an agreement reached in mediation pursuant to a statute that mandates such filing shall not be considered to be a violation of this paragraph.
- B. A mediator shall not disclose, directly or indirectly, to any participant, information communicated to the mediator in confidence by any other participant in the mediation process, whether the information is obtained before, during, or after the mediated settlement conference, unless that other participant gives the mediator permission to do so. A mediator may encourage a participant to permit disclosure, but absent such permission, the mediator shall not disclose.
- C. A mediator shall not disclose to court officials or staff any information communicated to the mediator by any participant within the mediation process, whether before, during, or after the mediated settlement conference, including correspondence or~~–~~ communications regarding scheduling or attendance, except as required to complete a report of mediator for the court; provided, however, when seeking to collect a fee for services, the mediator may share correspondence or communications from a participant relating to the fees of the mediator. The confidentiality provisions above notwithstanding, if a mediator believes that communicating certain procedural matters to court personnel will aid the mediation, then with the consent of the parties to the mediation, the mediator may do so. In making any permitted disclosure, a mediator shall refrain from expressing personal opinions about a participant or any aspect of the case with court officials or staff.
- D. The confidentiality provisions set forth in A, B, and C above notwithstanding, a mediator may report otherwise confidential conduct or statements made before during, or after mediation in the circumstances set forth in sections (1), (2), (3), (4), (5), (6), (7), (8), and (9) below:

- (1) A statute requires or permits a mediator to testify or to give an affidavit or to tender a copy of any agreement reached in mediation to the official designated by the statute.

If, pursuant to Family Financial Settlement (FFS) or Mediated Settlement Conference (MSC) Rules, a hearing is held pursuant to a motion for sanctions for either failure to attend a mediated settlement conference, or failure to pay the mediator's fee, the mediator who mediated that action and testifies either as the movant or pursuant to subpoena shall limit his/her testimony to facts relevant to a decision about the sanction sought and shall not testify about statements made by any participant that are not relevant to that decision.

- (2) If subpoenaed and order to testify or produce evidence in a criminal action or proceeding as provide in N.C.G.S. § 7A-38.1(1), N.C.G.S. § 7A-38.4(A)(j), and

OPEN FOR COMMENT UNTIL SEPTEMBER 20, 2019

N.C.G.S. § 7A-38.3(B)(g).

- (3) To a participant, non-participant, law enforcement personnel, or other persons affected by the harm intended where public safety is an issue, in the following circumstances:

 - (i) a party or other participant in the mediation has communicated to the mediator a threat of serious bodily harm or death to be inflicted on any person, and the mediator has reason to believe the party has the intent and ability to act on the threat; or
 - (ii) a party or other participant in the mediation has communicated to the mediator a threat of significant damage to real or personal property and the mediator has reason to believe the party has the intent and ability to act on the threat; or
 - (iii) a party's or other participant's conduct during the mediation results in direct bodily injury or death to a person.
- (4) In the event that a party to or a participant in a mediation has filed a complaint with the North Carolina Dispute Resolution Commission ([DRC](#)) or the North Carolina State Bar (State Bar) regarding the mediator's professional conduct, moral character, or fitness to practice as a mediator and the mediator reveals the communication or conduct for the purpose of defending him/herself against the complaint.
- (5) In the event that a party to or a participant in a mediation has filed [a](#) lawsuit against the mediator for damages or other relief regarding the mediator's professional conduct, moral character, or fitness to practice as a mediator and the mediator reveals the communication or conduct for the purpose of defending him/herself in the action.
- (6) With the permission of all parties, to an attorney who now represents a party in a case previously mediated by the mediator and in which no settlement was reached. Such discussion shall be intended to help the newly involved attorney understand any offers extended and any impediments to settlement. Mediators engaging in such conversations shall take great care, especially if some time has passed, to ensure that their recall of the discussion is clear, that the information is presented in an unbiased fashion, and, that no information flagged as confidential by another party is revealed
- (7) If the mediator is a North Carolina lawyer and a lawyer made the statements or committed the conduct reportable under subsection D(3) above, then the mediator shall report the statements or conduct to the State Bar or the court having jurisdiction over the matter in accordance with North Carolina State Bar Rule of Professional Conduct 8.3(e).

OPEN FOR COMMENT UNTIL SEPTEMBER 20, 2019

- (8) If the mediator concludes that, as a matter of safety, the mediated settlement conference should be held in a secure location, such as the courthouse, the mediator may seek the assistance of court officials or staff in securing a location, so long as the specific circumstances of the parties' controversy are not identified or identifiable.
- (9) If a mediator or mediator observer witnesses concerning behavior of an attorney during a mediation, that behavior may be reported, to the Lawyers Assistance Program of the State Bar for the purpose of providing assistance to the attorney for alcohol or substance abuse.

In making any permitted disclosures under this Standard, the mediator should make every effort to protect the confidentiality of non-complaining parties to or participants in the mediation, refrain from expressing personal opinions about a participant, and avoid disclosing the participants or the specific circumstances of the parties' controversy.

"Court officials and staff" as referenced in this Standard shall include court officials and staff of North Carolina state and federal courts, state and federal administrative agencies, and community mediation centers.

E. The duty of confidentiality as set forth in this Standard encompasses information received by the mediator and then disseminated to a nonmediator employee or nonmediator associate, acting as an agent of the mediator. With respect to a nonmediator employed by, or associated with, a mediator:

- (1) A mediator, who individually or together with other professionals, employs and/or utilizes a nonmediator in the practice, firm, or organization, shall make reasonable efforts to ensure that the practice, firm, or organization has provided reasonable assurance that the nonmediator's conduct is compatible with the professional obligations of the mediator;
 - i. A mediator having direct, or indirect, supervisory authority over the nonmediator shall make reasonable efforts to ensure that the nonmediator's conduct is compatible with the ethical obligations of the mediator; and
 - ii. A mediator may share confidential files with the nonmediator provided the mediator properly supervises the nonmediator to ensure the preservation of party confidences; and
 - iii. A mediator shall be responsible for the conduct of the nonmediators actions, or inactions, that would be a violation of the Standards of Conduct for Mediators if:

OPEN FOR COMMENT UNTIL SEPTEMBER 20, 2019

- a. The mediator orders or, with the knowledge of the specific conduct, ratifies the conduct involved that violates the Standards of Conduct; or
- b. The mediator has managerial authority over the nonmediator, or has direct supervisory authority over the nonmediator, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

(2) A mediator, who individually or together with other professionals, employs and/or utilizes a nonmediator in the practice, firm, or organization, shall make reasonable efforts to ensure that the nonmediator's conduct is compatible with the provisions set forth in paragraphs C and D of this Standard.

EF. Nothing in this Standard prohibits the use of information obtained in a mediation for instructional purposes or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

—

Comment to Paragraph E: Mediators may employ associates and/or assistants in their practice, including secretaries, law student interns, and paraprofessionals. Such associates and assistants, whether employees or independent contractors, act for the mediator in rendition of the mediator's professional services. A mediator must give such associates and assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to a mediation case. The measures employed in supervising nonmediators should take account of the fact that they do not have mediation training and are not subject to professional discipline by the DRC.